



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 6, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0386

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112343.

The Texas Department of Health (the "department") received a request for information about Carter's Special Care Home, A Pro Home Health Care Agency, and St. Anne Home Health Care. You contend that the requested information is excepted from disclosure under section 552.103 of the Government Code. You also contend that section 552.101 of the Government Code, in conjunction with various state statutes and federal regulations, excepts the requested information from disclosure. We have considered the exceptions you claim and have reviewed the documents at issue.

You note that you did not submit your request for a decision to this office within ten business days of receiving the request for information. Chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten business days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

In accordance with sections 552.301 and 552.302, the information at issue is presumed public. Section 552.103 is a discretionary exception, and the failure to timely raise section 552.103 results in the waiver of its protection. *See* Open Records Decision Nos. 551 (1990) (section 552.103 is discretionary). On the other hand, section 552.101 protects information that is confidential by law. Because the presumption of openness is overcome by a showing that information is confidential by law, we must consider your section 552.101 claim.

Portions of the requested information consist of reports about the hospital's compliance with federal law as a Medicare provider. Federal regulations require the department to release the HCFA form 2567, statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. It appears that the providers have had a reasonable opportunity to review and comment on the reports. We have marked the identifying information that must be withheld from these reports. The remaining information in these reports must be released in accordance with federal regulations.

Some of the submitted documents are subject to chapter 142 of the Health and Safety Code, which regulates the licensing of home and community support services agencies. Section 142.009(d) provides as follows:

(d) the reports, records, and working papers used or developed in an investigation¹ made under this section are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
- (5) on a form developed by the department that identifies deficiencies found without identifying a person, other than the home and community support services agency.

¹An "investigation" is defined as "an inspection or survey conducted by a representative of the department to determine if a licensee is in compliance with this chapter." Health & Safety Code § 142.001(18).

Health & Safety Code § 142.009 (footnote added). Several of the submitted documents are confidential under section 142.009(d) and cannot be released to the public. We have marked these documents accordingly.

Finally, one submitted form, which is a state form, falls within the scope of section 142.009(d)(5) and, therefore, is not confidential under that section. However, we must consider whether any of the information contained in this form is made confidential by the common-law right to privacy or the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b.

Information is excepted from disclosure under section 552.101 of the Government Code, in conjunction with the common-law right to privacy, if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Having carefully reviewed the information in the state form, we find that none of it is excepted from disclosure under section 552.101 in conjunction with the common-law right to privacy.

Section 5.08 of the MPA provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

V.T.C.S. art. 4495b, § 5.08. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to medical records is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. See V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). We have marked the information on the state form that is subject to the MPA. The department may only release this information in accordance with the MPA.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts

presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Karen Hattaway". The signature is written in a cursive style with a large, stylized "K" and "H".

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 112343

Enclosures: Marked documents

cc: Ms. Jocelyn Lane
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(w/o enclosures)